72-1407

APR 17 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-1407

RICHARD V. HENNINGER, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

WILLIAM BEAL DUNN,
DUNN & MCDONALD,
1 Maritime Plaza, Suite 2110,
San Francisco, California 94111,
(415) 362-3497,

DENNIS T. GARY,
GARY, NIELSEN & SCOTT,
135 8th Street,
San Francisco, California 94103,
(415) 621-6805,

Attorneys for Petitioner.

Subject Index

	Page
Prior proceedings	1
Grounds on which the jurisdiction of this court is invoked	2
Questions presented for review	3
Constitutional and statutory authorities	4
Facts	7
Argument	9
I	
The incident to service rule of Feres v. United States requires clarification by this court because it has resulted in highly technical, necessarily arbitrary, and conflicting decisions on the part of the lower courts	9
II	
The compensation theory is not a valid rationale for excluding servicemen from the benefits of the FTCA	12
A. The court below in United States v. Lee places undue reliance on Johansen, Patterson and Demko, in support of its argument on the compensation theory	12
B. Feres v. United States was based and decided on the rationale of the special military relationship and the necessity for discipline	12
A. The court below in the instant case and in United States v. Lee places undue reliance on Johansen, Patterson and Demko in support of its argument on the compensation theory	12
B. Feres v. United States was based and decided on the rationale of the special military relationship and the necessity for discipline	15
III	
Petitioner's injuries incurred while and in the course of processing for discharge are not "incident-to-service"	17

Page

A. Injuries incurred while, and in the course of processing for release from active duty, are not "incident-to-service" 17

B. The phrase "incident-to-service" should be defined by the special relationship and necessity for discipline rationale of Brooks, Feres and Brown 18

C. Henninger's injuries fall outside the special relationship and discipline rationale of Brooks, Feres and Brown 20

IV

The United States should be estopped to deny liability under the FTCA because its own wrongdoing precluded plaintiff from coming within the act 21

A. Plaintiff did not consent to elective surgery by military physicians or surgeons 21

B. Plaintiff did not consent to the "voluntary" extension of service for medical care and treatment.... 22

V

To deny the liability of the United States in this case would be to deny Henninger his rights under the Fifth Amendment to due process of law 25

Conclusion 28

Table of Authorities Cited

Cases	Pages
Alansky v. Northwest Airlines (Mont., 1968) 77 F.Supp. 556	19, 20, 25
Brooks v. United States (1949) 337 U.S. 49, 69 S.Ct. 918	10, 19, 20, 21, 25, 26
Calloway v. Garber, 289 F.2d 171 (9th Cir. 1961), cert. den. 368 U.S. 874, 82 S.Ct. 120, 7 L.Ed.2d 76	19, 20
Downes v. United States (1965) 249 F.Supp. 266	19, 20
Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950),	passim
Gerald Jacob Peiffer v. United States (1942) 96 Ct. Cl. 344	24
Johansen v. United States (1951) 343 U.S. 427	13, 14
Knoch v. United States (9th Cir. 1963) 316 F.2d 532	9, 18
Patterson v. United States (1959) 359 U.S. 495	13, 14
Schwager v. United States (E.D. Pa., 1968) 279 F.Supp. 262	9
United States v. Brown (1954) 348 U.S. 110, 99 L.Ed.2d 139, 75 S.Ct. 141	9, 13, 16, 18, 19, 22, 25, 26
United States v. Demko (1966) 385 U.S. 149, 17 L.Ed.2d 258, 87 S.Ct. 382	13, 14, 15
United States v. Downes (1965) 249 F.Supp. 626	17, 18, 25
United States v. Lee (9th Cir., 1968) 400 F.2d 558	9, 12, 13, 14, 18, 19, 20
United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963)	9

Codes

	Pages
10 U.S.C.:	
Section 507	4, 20, 22
28 U.S.C.:	
Section 1254 (1)	2
Section 1291	2
Section 1346 (b)	1, 2, 5
Section 2101 (c)	2
Section 2674	5, 15, 26
28 U.S.C. (Federal Tort Claims Act):	
Sections 2671-2680	1, 2
Section 2680	6, 15, 16, 26

Constitutions

Fifth Amendment 4, 12, 25

Rules

Supreme Court, Rule 22 (3) 2

Statutes

70A Stat. 319, Chapter 1041, Section 1 23

Texts

49 Military Law Review, pp. 109, 125 10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No.

RICHARD V. HENNINGER, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

PRIOR PROCEEDINGS

The complaint was filed in the United States District Court for the Northern District of California on August 8, 1967. A cause of action was alleged against the United States for medical malpractice resulting in the loss of a serviceman's left testicle. The cause of action was alleged to arise under the Federal Tort Claims Act, 28 U.S.C. Sections 1346 (b), 2671-2680.

Respondent's motion for summary judgment was denied on June 26, 1969. The trial was had before the Honorable Gerald S. Levin on April 8, 1970.

Memorandum of Decision was filed April 16, 1970. Judgment was entered April 23, 1970 and an Order amending the Memorandum of Decision was filed May 25, 1970, dismissing Plaintiff's actions.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under the provisions of Title 28 U.S.C. Section 1291 by the filing of Notice of Appeal on June 22, 1970. After briefing and oral argument the Court of Appeals affirmed the dismissal in its Judgment entered January 17, 1973.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Judgment of the Court below was filed and entered on January 17, 1973.

The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Section 1254 (1), 2101 (c) and Rules of the Supreme Court, Rule 22 (3). Federal Jurisdiction was and is invoked under the provisions of Title 28 U.S.C. Section 1346 (b) and Sections 2671-2680.

This Court should grant this petition because (a) the decision below is in conflict with applicable decisions of this Court; (b) the decision below is in conflict with decisions from other circuits; (c) and the rulings of this Court in *Feres v. United States, infra,* and in subsequent cases in regard to the exclusion of servicemen from coverage under the F.T.C.A., are badly in need of clarification.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court below in the instant case is in conflict with applicable decisions of this Court.

2. Whether the incident-to-service rule of *Feres v. U. S.* sufficiently defines the exclusion of servicemen from the F.T.C.A. so as to be an adequate guide for the Courts below.

3. Whether the incident-to-service rule of *Feres v. U. S.* excludes recovery for injuries to a serviceman caused by medical malpractice in treatment rendered (a) after release from all duties while processing for discharge and four days prior to scheduled discharge; (b) while on extended active duty for medical care and treatment only.

4. Whether the Compensation Rationale is a valid rationale for excluding Servicemen from the benefits of the F.T.C.A.

5. Whether the lack of consent of petitioner to the elective surgery in question and Petitioner's expressed desire to have same accomplished by civilian doctors, estops the United States from asserting the exclusionary rules in question.

6. Whether the retention of Petitioner on active duty for medical care and treatment only was with his valid consent; and if not;

7. Whether said lack of consent places Petitioner outside of the exclusionary rules in question.

8. Whether the exclusionary rules in question operate in such an arbitrary and capricious manner in

general as well as in Petitioner's case so as to deprive Petitioner of due process of law.

9. Whether the decision of this Court in *Feres v. United States* is in conflict with the Federal Tort Claims Act.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

10 U.S.C. 507:

> (a) An enlisted member of an armed force on active duty whose term of enlistment expires while he is suffering from disease or injury incident to service and not due to his misconduct, and who needs medical care or hospitalization, may be retained on active duty, with his consent, until he recovers to the extent that he is able to meet the physical requirements for reenlistment, or it is determined that recovery to that extent is impossible.

(b) This section does not prevent the retention in service, without his consent, of an enlisted member of an armed force under section 972 of this title. (Jan. 2, 1968, P. S. 90-235. Sec. 2(a)(1)(B), 81 Stat. 754.)

28 U.S.C. Section 1346 (b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Section 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the

pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. Section 2680:

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, Sec. 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

As amended July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, Sections 2 (a) (2), 13 (5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, Title II, Sections 202 (b), 73 Stat. 389.

FACTS

The parties stipulated in effect that its agents were negligent in the care and treatment of plaintiff on or about May 24-25, 1966; and by reason of the negligence of the agents of defendant, plaintiff suffered complications ultimately resulting in an atrophied left

testicle; and that judgment in the amount of $17,500 be entered against defendant unless the Court finds that plaintiff is precluded from recovery under the Federal Tort Claims Act because of his military status under the doctrine of *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153 (1950). (RT 3:10-4:6)

Plaintiff's four year tour of duty with the Navy was to expire on January 29, 1966. He was involuntarily extended until May 29, 1966. (RT 9:11-10:3) He had been entirely processed for discharge except for his discharge physical. (RT 10:8-14) The discharge physical revealed the existence of a double hernia. (RT 13:24 to end of page)

Plaintiff was advised that he would have to have the hernia repaired before he was discharged. Plaintiff told the doctor that he would have it taken care of by a civilian doctor. The examining doctor told plaintiff that he would not sign the medical release. (RT 10:23-12:9)

The operation took place on or about May 25, 1966, four days prior to his scheduled release. (RT 15:24-16:6)

On May 27, 1966, plaintiff signed a request which read as follows:

> I request retention in the Naval Service beyond the normal date of expiration of my enlistment as extended for such period of time as is necessary to complete treatment and hospitalization. (RT 22:19-25)

Plaintiff felt that signing this document was just a formality. (RT 29:22-24)

Plaintiff was honorably discharged or released to inactive duty on August 24, 1966. (RT 16:13-15)

It has been determined that plaintiff is entitled to a VA pension of $47 per month for an indefinite period of time. (RT 39:1-7)

ARGUMENT

I

THE INCIDENT TO SERVICE RULE OF FERES v. UNITED STATES REQUIRES CLARIFICATION BY THIS COURT BECAUSE IT HAS RESULTED IN HIGHLY TECHNICAL, NECESSARILY ARBITRARY, AND CONFLICTING DECISIONS ON THE PART OF THE LOWER COURTS.

Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950), held, at page 146, that the Federal Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

The basic rationale for this decision was the possible effect of such suits on the special relationship between a soldier and his superiors and the necessity to maintain discipline. *United States v. Brown,* 348 U.S. 110, 112, 75 S.Ct. 141, 99 L.Ed.2d 139 (1954); *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); *Knoch v. United States* (9th Cir., 1963) 316 F.2d 532; *United States v. Lee* (9th Cir., 1968) 400 F.2d 558; *Schwager v. United States* (E.D. Pa., 1968) 279 F.Supp. 262.

The Court in *Lee* at page 562 et seq. argues that the availability of administrative compensation in this

type of case precludes a tort suit against the Government.

There are two major problems with this argument. First, the Court fails to note the distinction between "incident-to-service" and "scope of employment" as pointed out at footnote 62, 49 *Military Law Review* 109, 125:

> Judge Advocates would do well to keep the distinction between "in-line-of-duty," "acting within the scope of employment," and "incident-to-service," in mind when examining cases in this area. The Brooks brothers were on authorized leave "in-line-of-duty" when injured and were entitled to certain administrative remedies which the court recognized. The *Brooks* case was not overruled by the *Feres* decision. "Scope of employment" is a standard which is applied to the alleged tortfeasor in order to ascertain the liability of the United States under the master-servant standards of the FTCA.

Secondly, the authorities cited by the Court have to do with the Federal Employees Compensation Act and with Prison law. This comparison with other compensation acts and their respective provisions for an election or exclusion of remedies is directly and unequivocally rejected by the Supreme Court in *Brooks v. United States* (1949), 337 U.S. 49, 69 S.Ct. 918, at 337 U.S. page 53.

If the availability of administrative compensation is seen as the primary rationale, absurd consequences may follow. A serviceman whose injury is given a line-of-duty-No determination is precluded from ad-

ministrative compensation of any kind. Since there is no administrative compensation available to him, he would be able to bring suit under the FTCA. He could possibly even win if his intentional misconduct that is the basis of the LOD-No determination was not the cause in fact or the proximate cause of his injury.

It is therefore submitted that "incident-to-service" should be defined with the special relationship and necessity for discipline rationale of *Feres* in view, and that the availability of administrative remedies should not be relevant to the determination of a serviceman's right to sue under the FTCA.

The trend seems to be to make this term all inclusive and to avoid having to weigh the many factors relevant to a determination of the impact of a particular type of case on the special relationship and the necessity for discipline. The Military Services are currently experiencing a serious morale crisis. The President, the Congress, and the Services themselves are making every effort to make military service a more attractive career possibility and a less onerous sacrifice. Broadening the exclusionary rule of *Feres* runs directly counter to this public policy and has a direct effect on the national security.

The broad definition of "incident-to-service" presently being developed by the courts has the effect of excluding servicemen from remedies under the FTCA merely because they are servicemen. This is an arbitrary and unreasonable discrimination. Unless the definition of incident-to-service is more carefully and narrowly construed, servicemen are arbitrarily being

denied a right available to most civilian citizens. This constitutes a violation of due process and equal protection under the Fifth Amendment to the Constitution.

II

THE COMPENSATION THEORY IS NOT A VALID RATIONALE FOR EXCLUDING SERVICEMEN FROM THE BENEFITS OF THE FTCA.

A. THE COURT BELOW IN UNITED STATES v. LEE PLACES UNDUE RELIANCE ON JOHANSEN, PATTERSON AND DEMKO, IN SUPPORT OF ITS ARGUMENT ON THE COMPENSATION THEORY.

B. FERES v. UNITED STATES WAS BASED AND DECIDED ON THE RATIONALE OF THE SPECIAL MILITARY RELATIONSHIP AND THE NECESSITY FOR DISCIPLINE.

The issue, in following *Feres,* is the definition and application of the phrase *injuries arising out of or incurred in the course of activity incident to service.*

A. The Court below in the instant case and in United States v. Lee, infra, places undue reliance on Johansen, Patterson and Demko in support of its argument on the compensation theory.

The Court of Appeals in the instant case states at line 28, page 3 of its opinion:

> This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits.[2]

---

[2]There is some confusion regarding whether the presence of an administrative remedy precludes relief under the Fed-

The Court in the *United States v. Lee* (9th Cir., 1968) 400 F.2d 558, at 562-563, develops an exclusionary rule based on the compensation rationale. The Court bases its argument on *Johansen v. United States* (1951) 343 U.S. 427; *Patterson v. United States* (1959) 359 U.S. 495, and on *United States v. Demko* (1966) 385 U.S. 149, 17 L.Ed.2d 258, 87 S.Ct. 382.

At page 563 this Court concludes:

> However, the case law above cited has shown that the Supreme Court, in the absence of a statutory provision that the compensation remedy is exclusive, has held that where there exists a form of administrative compensation for government employees injured in the performance of their duties, the availability of such remedy precludes government liability on some other ground. In *Johansen v. United States,* supra, the Court noted that . . . "Congress did not specifically declare that the compensation act was exclusive of all other remedies (343 U.S. at 433, 72 S.Ct. at 854). The same compensation act was involved in *Patterson v. United States,* supra.

First it should be noted that *Johansen,* supra, was a 5-4 decision with Black, Minton, Vinson and Douglas dissenting.

The compensation act involved was the *Federal Employees Compensation Act of 1916.* At that time there

---

eral Tort Claims Act. The answer seems to be yes, except when the alternative source of compensation is Veterans' benefits. *Compare United States v. Demko,* 1966, 385 U.S. 149 *with United States v. Brown, supra,* note 1. However, while the availability of such benefits may not be determinative, we believe that it at least tips the scales in favor of a strict reading of *Feres.*

was no other remedy against the sovereign. Thus the remedy under the act was exclusive.

In 1943 the *Clarification Act* waived sovereign immunity in regard to employees on public vessels who were employed through the War Shipping Administration. This was a specific exception to the exclusiveness of the remedy under the FECA. Thus the rights of other employees on public vessels were left unaffected.

In 1946 the *Federal Tort Claims Act* was passed. Some confusion followed in regard to claims by federal employees. In response the *Federal Employees Compensation Act* was amended in 1949 to provide that compensation under the act was the exclusive remedy for those covered by the act. *Johansen,* supra, was decided in 1951. *Patterson,* supra, was specifically based on the authority of *Johansen.*

There was clear statutory authority and express congressional intent upon which to base the decision in *Johansen,* this Court's statement in *Lee,* supra, to the contrary notwithstanding.

Demko, supra, also relies on *Johansen* and *Patterson.* The Court's reasoning is rather obtuse but would seem to be based largely on an abhorrence of the idea that prisoners should have greater rights than federal employees:

> There is nothing in the legislative history of this latter act which pointed to any purpose to add tort claim recovery for federal prisoners after they have already been protected by 18 USC §4126. Indeed to hold that the 1946 FTCA was

> designed to have such a supplemental effect would be to hold that injured prisoners are given greater protection than all other government employees who are protected exclusively by the FECA, a congressional purpose not easy to infer.

The *Federal Tort Claims Act* in 28 U.S.C. §2680 contains a number of specific exceptions to its coverage. Prisoners' claims are not excepted therefrom.

The Court in the above quotation reasoned that Congress expressed no intent to include prisoners within the Act. We are unable to follow the logic of this proposition. Where a statute contains specific exceptions to its coverage, generally accepted canons of statutory construction dictate that all others falling within the clear meaning of the act are covered thereby. A contrary conclusion just does not make sense.

It is therefore submitted that *Demko* is good authority only in regard to prisoners' claims, and that because of their lowly status in our society. Are servicemen to be dealt with in the same manner?

B. Feres v. United States, infra, was based and decided on the rationale of the special military relationship and the necessity for discipline.

The Court in *Feres v. United States* (1950) 340 U.S. 135, 71 S.Ct. 153, at 340 U.S. 141-143 discusses this rationale.

The Court quotes 28 U.S.C. §2674:

> The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.

The Court goes on to point out that there has never been liability at common law on behalf of a soldier against his superiors in a typically military situation. The act did not create new causes of action. It merely waived its immunity where but for that immunity there would have been a good cause of action.

The Court in *United States v. Brown* (1954) 348 U.S. 110, 99 L.Ed.2d 139, 75 S.Ct. 141, pointed out that liability of a hospital for its negligence is not entirely new.

The primary relationship involved in the instant case is not that of soldier and superiors but of a patient in a permanent stateside hospital. It is therefore submitted that Mr. Henninger's case does not fall within the exclusionary rule of *Feres*.

A second basis for excluding servicemen from coverage under the act is 28 U.S.C. §2680 which excludes from coverage:

> Any claim arising out of the combatant activities of the military or naval forces, or coast guard, during time of war.

This is a specific and limited exception. It would be logical to assume that all other claims by servicemen, those not arising out of combatant activities in time of war, are covered by the act. If Congress had intended to make the exception broader it would have done so.

In any case it is clear that Mr. Henninger's case does not fall within this one and only express exclu-

sion of military claims from coverage by the act in question.

III

PETITIONER'S INJURIES INCURRED WHILE AND IN THE COURSE OF PROCESSING FOR DISCHARGE ARE NOT "INCIDENT-TO-SERVICE."

A. Injuries incurred while, and in the course of processing for release from active duty, are not "incident-to-service."

A portion of the negligence causing plaintiff's injuries occurred while undergoing surgery within four days of his then release date. (RT 15:24-16:6) A motion for summary judgment was denied in *United States v. Downes* (1965) 249 F.Supp. 626, where the serviceman was injured in a collision between his private car and a military vehicle just eleven days prior to his scheduled release date. He had been on a special one day pass for 30 minutes prior to the accident. The purpose of the pass was to allow him to supervise the packing of his household goods for shipment to his permanent residence; which packing and moving was to be done by a government contractor.

The present case is even more favorable because here plaintiff had been relieved of all duties and had even completed all of his discharge processing except for the medical release. He had only four days to go and not eleven. The fact that in *Downes* the serviceman was on pass is not distinguishing because it was a special pass incident to processing for release from active duty. Downes was not free to go fishing. He

was to go to and remain at his quarters to supervise the packing. Had he not done so he would have been liable for disciplinary action.

Knoch v. United States (9th Cir., 1963) 316 F. 2d 532, involved a similar situation in that the serviceman was injured by the negligence of a corpsman while undergoing a physical as a preliminary to a call to active duty. Any possible effect that a medical malpractice case could have on the special relationship between a soldier and his superiors and on the necessity for discipline would be greatest in the *Knoch* case because, all of his service, if any, lies before him. In the present case and in *Downes* the serviceman had completed his active service and had been relieved of all duties (in the present case). Any possible suit would be initiated after his discharge. The effect, if any, of a medical malpractice suit under these circumstances on the special relationship and the necessity for discipline would be minimal if not in fact totally nonexistent.

B. The phrase "incident-to-service" should be defined by the special relationship and necessity for discipline rationale of Brooks, Feres and Brown.

The Court in the *United States v. Lee,* supra, at 564, found that that case fell squarely within the special relationship and discipline rationale of *Feres,* supra.

The Court's attempt to explain away the discipline rationale and the Supreme Court's explanation of it in *Brown,* supra, is difficult to follow (see the first full paragraph on page 564).

The Court in *Calloway v. Garber,* 289 F.2d 171, 173-174 (9th Cir. 1961), cert. denied 368 U.S. 874, 82 S.Ct. 120, 7 L.Ed.2d 76, cited in *Lee,* supra, at 564, held that discipline rationale did not apply because:

> The instant case can find no shelter within those reasons [in *Brown*], since the negligent and injured parties here were members of different branches of service and were engaged in entirely different and unconnected activities at the time of the accident.

The Court in *Calloway* then went on to hold the exclusionary rule in *Feres* applied. At page 173 the Court makes it clear that it is applying the incident to service rule. The Court does not make clear what the scope of the incident to service rule is. Nor did the Court have occasion to do so. Both parties were in the process of carrying out specific military orders at the time of the accident. The special relationship, mentioned in *Brown,* supra, did, in fact, exist.

In *Brooks v. United States* (1949) 337 U.S. 49, 69 S.Ct. 918, the claimants were on leave; in *Brown,* the claim was for aggravation of a prior injury by the Veterans Hospital; this occurred after discharge of the serviceman; in *Downes v. United States* (1965) 249 F.Supp. 266, the claimant was injured eleven days from date of discharge while on special pass for a purpose specifically related to processing for discharge; in *Alansky v. Northwest Airlines* (Mont., 1968) 77 F.Supp. 556 the serviceman was being transported to the point of discharge when he was killed. The common element is the diminution of and change

in character of the special relationship of a soldier to his superiors.

This diminution and change of character was not present in *Calloway* or in *Lee*.

C. Henninger's injuries fall outside the special relationship and discipline rationale of Brooks, Feres and Brown.

At the time of the first negligent act, during the operation, Henninger was processing for discharge. He was relieved of all regular duties. His sole duties involved processing for discharge. He could not have been assigned to a regular duty position under ordinary circumstances. Thus the character of the special relationship had materially changed. The possible extent of the assertion of military authority over him had diminished significantly, as in *Brooks, Downes* and *Alansky*. The special relationship was coming to its end and was in a phase clearly separable from the balance of the relationship. Henninger has an even better case than in *Downes*. Downes had eleven days until his discharge date and Henninger had only four days to go.

A further distinction makes this case more favorable than either *Brooks* or *Downes*. The negligence involved was of a continuing nature up to and including Henninger's day of final release. From May 30 until August 24, 1966, Henninger was retained in the service by virtue of Title 10 U.S.C. §507. Assuming the serviceman consents to this extension, the military has no authority to order the performance of duties not consistent with the most rapid possible recovery.

The serviceman is retained in the service and is in the service for one purpose only, medical care and treatment.

The character of the special relationship has changed significantly. The extent of military authority is drastically reduced. He is no longer a normal soldier available to fulfill the needs of the service.

In *Brooks* the distinguishing characteristic of the claimants' status was that they were on leave. A soldier on leave is subject to full military authority and discipline. He may be recalled at a moment's notice to perform regular or extraordinary duties. A serviceman on extended duty for medical care and treatment is not subject to be recalled to regular duty.

IV

THE UNITED STATES SHOULD BE ESTOPPED TO DENY LIABILITY UNDER THE FTCA BECAUSE ITS OWN WRONGDOING PRECLUDED PLAINTIFF FROM COMING WITHIN THE ACT.

A. Plaintiff did not consent to elective surgery by military physicians or surgeons.

Plaintiff expressed the desire to have the condition taken care of by civilian physicians. He further expressed the desire to be released from active duty on the scheduled date. But the examining physician told plaintiff that he would not sign the medical release. (RT 10:23-12:9) Thus in effect plaintiff had no choice. He submitted under duress and an assertion of authority to which it was reasonable for plaintiff to submit. The act of forcing plaintiff to undergo such

an operation would of necessity involve a post-operative recovery period extending beyond the scheduled effective termination of service.

If plaintiff had been released according to his desires and had the operation on the outside, either he would not have lost his left testicle or he would have been able to sue either a civilian doctor or the Veterans Administration for malpractice in addition to receiving administrative compensation for a service connected disability. *United States v. Brown* (1954) 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed.2d 139.

B. Plaintiff did not consent to the "voluntary" extension of service for medical care and treatment.

Plaintiff signed the "voluntary" request because he thought it was just a formality. (RT 29:22-24) And so it was. He had been forced to undergo the elective surgery because he had been wrongfully led to believe that he would not otherwise be discharged.

Once having undergone the operation; if he had refused to extend for post-operative care, any liability on the part of the military for his ultimate condition would either be extinguished or extremely difficult to prove. He would thus lose his right to care, treatment or compensation by the Veterans Administration. It should also be pointed out that he was asked to sign the request, not before the operation, but two days after on May 27, 1966. (RT 22:19-25) Plaintiff had no choice but to sign the paper.

The law governing such voluntary extensions for medical care and treatment is Title 10 USC §507.

(formerly Ch. 1041, §1, 70A Stat. 319) The text is quoted in full below:

> (a) An enlisted member of an armed force service on active duty whose term of enlistment expires while he is suffering from disease or injury incident to service and not due to his misconduct, and who needs medical care or hospitalization, may be retained on active duty, *with his consent,* until he recovers to the extent that he is able to meet the physical requirements for re-enlistment or until it is determined that recovery to that extent is impossible.
>
> (b) This section does not prevent the retention in service, without his consent, of an enlisted member of an armed force under section 972 of this title.

Consent of the serviceman is thus essential for this particular type of extension.

As pointed out above, plaintiff did not effectively consent to this extension. A portion of the negligence in failing to discover and repair the damage done, occurred during this period that plaintiff was being unlawfully detained.

At the trial the United States in Recross brought out the fact that plaintiff's left testicle had atrophied at the time he was released from service in August of 1966. (RT 31:19-32:4) The post-operative medical reports note first the marked swelling and then the complete atrophy of the left testicle. (RT 37:16-38:1) However, the final physical examination given prior to discharge does not mention atrophy of the left testicle. (RT 38:1-3) It is not now disputed that this

failure to mention the atrophied testicle on the final physical is in fact a false description of plaintiff's physical condition at the time of his release in August of 1966. Nor can it be disputed that the omission was either negligent or intentional; in either case a wrongful act effectively preventing, hindering and obscuring plaintiff's right to administrative compensation and to possibly a cause of action in tort for malpractice against either the United States or the individual physicians.

The purpose of a final physical examination and for retention for medical treatment was well put by the Court in *Gerald Jacob Peiffer v. United States* (1942) 96 Ct. Cl. 344:

> At page 347:
>
> It is a necessary preliminary to his discharge that the man be physically examined. This is for the reason that men contracting injury or disease in line of duty are entitled under law to pensions or compensation; hence before a man leaves the service it must be determined whether or not he is suffering from disability entitling him to a pension . . .
>
> At page 348:
>
> Retention for treatment is not only for the benefit of the man concerned, but it is also for the benefit of the Government. Treatment may correct the disease and save the Government from liability for a pension.

Thus the service first attempted to save the Government money by attempting to correct the condition so

as to preclude the necessity to pay compensation. Because the surgery was negligently done, complications developed which were not arrested or corrected. He was involuntarily and unlawfully detained as a result. Then, by some mischance, mention of the compensable condition was not made in his final physical preliminary to his release in August, 1966.

The lack of free and voluntary consent to the elective surgery and, subsequently, to the medical extension goes to his military status at the time. It is submitted that Henninger's legal ties to the military ended on the scheduled discharge date; and that he was unlawfully detained in the service for the period of the medical extension.

It follows that Henninger falls squarely within the facts of *Brown, supra.*

V

TO DENY THE LIABILITY OF THE UNITED STATES IN THIS CASE WOULD BE TO DENY HENNINGER HIS RIGHTS UNDER THE FIFTH AMENDMENT TO DUE PROCESS OF LAW.

The compensation theory is not a rational basis for discrimination against Henninger. See point I, supra. The *Brooks* brothers, *Brown, Downes, Alansky* and a number of others would have to be excluded from the benefits of the FTCA, for in each case the claimant was eligible for administrative compensation or benefits.

Every serviceman and former serviceman is eligible for such administrative compensation and benefits subject to two clearly defined exceptions. Such an individual may be excluded if the injury was not service connected or the injury occurred because of or while the individual was determined to be in a line of duty No status. (Line of duty as used to determine the government's liability to the injured soldier is distinguished from line of duty or scope of employment as used to determine the government's liability to a third party.)

If the compensation theory is rationally applied, practically all servicemen are excluded.

If the phrase incident to service is used, without further definition, to exclude Henninger, the result is an arbitrary exclusion which is directly contrary to *Brooks, Feres* and *Brown.*

It is even more clearly contrary to the express language of the Federal Tort Claims Act. Congress clearly did not intend to exclude all servicemen. Section 2674 waives immunity as to otherwise good causes of action. Section 2680 makes a clear and narrow exception as to any claims arising out of combatant activities in time of war. The act does not provide for any other exceptions in regard to servicemen. Nor do the various administrative compensation acts provide that said administrative compensation shall be the exclusive remedy. In contrast, all state workmen's compensation acts, the Federal Employee's

Compensation Act (as amended in 1949) and others do contain express exclusive remedy clauses.

If this Court is to deny liability in this case it must base its denial on a rational and authoritative foundation. In view of the expressed intent of Congress and the above cited decisions of the Supreme Court, can a rational and authoritative basis for denial of liability be constructed. It is submitted that *Feres* flies in the face of the statute and can be considered little more than judicial legislation.

One further point should be mentioned. The Courts have adverted to the fact that Congress has not acted since the decision in *Feres*. But they have failed to point to any reason compelling Congress to act. *Feres*, in its own language, makes it abundantly clear that all servicemen are not excluded from the Federal Tort Claims Act. In order to reasonably impose a duty on the Congress to respond to the Court's construction of a statute, that construction must be clear and unequivocal. The argument that the consent of Congress is presumed from its silence is so specious that its use indicates a grasping at straws because the rational basis for discrimination in this situation has been lost.

Because of the absence of readily applicable guidelines, the conflicting decisions among the lower Courts and because the Supreme Court cases are in conflict with the statute itself, any decisions in regard to a serviceman's coverage under the Act are necessarily

arbitrary and capricious and without a rational basis. Therein lies the deprivation of due process and equal protection of the laws.

CONCLUSION

It is submitted that there is no longer a rational basis for the exclusion of servicemen from coverage under the Federal Tort Claims Act.

As pointed out above, the compensation theory does not hold water and never did. The special relationship and discipline rationale has become obsolete in view of the greatly improved status of servicemen's rights within the military. There is every reason to distinguish the rights of civil servants from the rights of servicemen. The servicemen should be given greater rights in regard to civil actions because their pay is lower and their hardship is greater.

Ordinary rules of statutory construction applied to the Federal Tort Claims Act place all of the judicially legislated exclusionary rules in direct conflict with the plain meaning of the statute and the presumed intent of Congress. It is respectfully submitted that the Supreme Court has exceeded its jurisdiction in its exclusionary ruling in Feres and its progeny.

The crux of the 9th Circuit decision in the instant case appears to be that it is more important to draw a clear line of demarcation (Opinion 3:8-4:8). If the

guidelines of the statute were followed, drawing this line would be a simple matter.

Dated, San Francisco, California,
April 15, 1973.

WILLIAM BEAL DUNN,
DUNN & MCDONALD,

DENNIS T. GARY,
GARY, NIELSEN & SCOTT,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

In the United States District Court for the Northern District of California

Civil No. 47614

Richard V. Henninger, Plaintiff,
vs.
United States of America, Defendant.

JUDGMENT

This case came on for trial before the Court on April 8, 1970.

Dunn, Hart & McDonald by William B. Dunn, Esq. appeared for the plaintiff and James L. Browning, Jr., United States Attorney by Jerry K. Clement, Assistant United States Attorney, appeared on behalf of the defendant.

Evidence, both oral and documentary, was introduced by the respective parties. (Plaintiff was present at all times during the trial and testified in his own behalf.)

The court filed a memorandum decision on April 16, 1970, holding in favor of the defendant. Said

memorandum decision constitutes the findings of fact and conclusions of law required by Rule 52(a), Federal Rules of Civil Procedure.

Based upon such findings and conclusions,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint herein and that judgment be and hereby is entered in favor of the defendant together with costs of suit incurred.

Dated:

.....

United States District Judge

United States District Court for the
Northern District of California

No. Civil 47614-GSL

Richard V. Henninger,
vs.
United States of America,

NOTICE

To

Dunn, Hart & McDonald, 2 Pine Street, San Francisco, CA

United States Attorney, 450 Golden Gate Ave., San Francisco, CA 94102

You Are Hereby Notified that on April 23, 1970 a Decree Judgment was entered of record in this office in the above-entitled case.

C. C. Evensen
Clerk, U. S. District Court
thk

San Francisco, California
April 23, 1970

In the United States District Court for the Northern District of California

Civil No. 47614

Richard V. Henninger, Plaintiff,
vs.
United States of America, Defendant.

[Filed May 25, 1970]

ORDER

Upon motion by the plaintiff and in order to incorporate a previous stipulation between the parties, the Memorandum of Decision entered and filed by this Court on April 16, 1970, is amended as follows.

Page 1, lines 22-24 of said Memorandum of Decision, which now reads:

> Thereafter, plaintiff suffered complete atrophy of his left testicle, which injury plaintiff alleges to be due to the negligence of those in attendance at his Naval operation.

is hereby amended to read instead:

> Thereafter, plaintiff suffered complete atrophy of his left testicle, which injury the parties have stipulated and the court finds to be due to the

negligence of those in attendance at his Naval operation.

The court also corrects hereby a clerical error in said Memorandum of Decision. Page 5, lines 1-5, which now reads:

> That plaintiff was very nearly through with his tour of duty makes his position somewhat more sympathetic, but does avoid the clear pronouncements of the Ninth Circuit respecting the right of servicemen similarly situated to maintain suit under the Federal Tort Claims Act.

is hereby corrected to read instead:

> That plaintiff was very nearly through with his tour of duty makes his position somewhat more sympathetic, but such fact does not avoid the clear pronouncements of the Ninth Circuit respecting the right of servicemen similarly situated to maintain suit under the Federal Tort Claims Act.

It Is So Ordered.

Dated: May 25, 1970

/s/ Gerald S. Levin
United States District Judge

United States Court of Appeals
For the Ninth Circuit

No. 26,467

Richard V. Henninger,
Plaintiff-Appellant,
vs.
United States of America,
Defendant-Appellee.

[Filed January 17, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: Duniway and Trask, Circuit Judges, and Burns, District Judge*

Duniway, Circuit Judge:

Henninger's Federal Tort Claims action was dismissed by the district court and he appeals. We affirm.

Henninger was scheduled for discharge from the Navy on May 29, 1966. At his physical examination, the last step in the discharge process, it was discovered that he had a double hernia. Although Henninger expressed a desire to have this condition repaired after he became a civilian, he was informed

*Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

that his medical release would not be signed unless he submitted to surgery while in the Navy. He did so, and the operation was performed on May 25, 1966. The Government has stipulated that this operation was performed negligently by Navy doctors, causing Henninger to suffer complete atrophy of his left testicle.

The trial court held that Henninger's claim is barred by the decision of the Supreme Court in *Feres v. United States,* 1950, 340 U.S. 135. There, the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. This rule was held to include the claims of persons who "while on active duty and not on furlough, [sustain] injury due to negligence of others in the armed forces." *Id.* at 138.

On its face, *Feres* disposes of this case. Henninger asks us to avoid its coverage on three grounds. First, he asks us to overrule *Feres.* This argument is addressed to the wrong court. Second, he argues that medical malpractice claims should be exempted from the *Feres* rule; otherwise we would be "countenancing" negligence by armed forces doctors. Two of the claims which gave rise to *Feres* were based upon medical malpractice. Thus this argument is merely a modification of the first, and we reject it for the same reason.

Third, Henninger argues that, even if the *Feres* rule is valid in the precise fact situations which were

before the Court there, its rationale does not extend to this case. This argument runs as follows: *Feres* was based upon the special relationship existing between a soldier and his superiors and the effect that Federal Tort Claims suits could have on military discipline. Here, however, the operation which caused his injury was performed after he had been completely processed for discharge, so that permitting Henninger to sue could not have the undesirable consequences feared by the Supreme Court. Thus, it is illogical to prevent this action, because it is undisputed that he could have brought it had the surgery been performed in a Veterans' hospital following his release from active duty.[1]

The precise rationale for the *Feres* rule and its continuing validity have been the source of some confusion. *Compare United States v. Lee,* 9 Cir., 1968, 400 F.2d 558, 562-64, *with Callaway v. Garber,* 9 Cir., 1961, 289 F.2d 171, 172-74. However, even if we were to accept Henninger's formulation of that rationale, he would not prevail here. To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and it is

[1]In such circumstances, his claim would fall within the precise holding of *United States v. Brown,* 1954, 348 U.S. 110.

the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs. *See Hall v. United States,* 1 Cir., 1971, 451 F.2d 353, 354; *Coffey v. United States,* S.D. Cal., 1971, 324 F.Supp. 1087, 1088, *aff'd per curiam* 9 Cir., 1972, 455 F.2d 1380. This is a classic situation where the drawing of a clear line is more important that being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits.[2] We hold that *Feres* absolutely bars Federal Tort Claims actions by servicemen injured "while on active duty and not on furlough . . . due to the negligence of others in the armed forces."[3] However close to discharge Henninger was at the time of his injury, he was still on active status, and may not bring this action.

In a last ditch effort to save his suit, Henninger argues that the Government is "estopped" from invoking the rules of *Feres,* because he was told that he could not be released without having the hernia repaired, a representation which all parties now concede

---

[2]There is some confusion regarding whether the presence of an administrative remedy precludes relief under the Federal Tort Claims Act. The answer seems to be yes, except when the alternative source of compensation is Veterans' benefits. *Compare United States v. Demko,* 1966, 385 U.S. 149 *with United States v. Brown, supra,* note 1. However, while the availability of such benefits may not be determinative, we believe that it at least tips the scales in favor of a strict reading of *Feres.*

[3]While we are aware of no case which expressly adopts the absolutist reading of *Feres* which we adopt here, it is significant that, of the vast number of cases interpreting that rule, Henninger cites us only one which departs from our holding. *Downes v. United States,* D.N.C., 1966, 249 F. Supp. 626.

was false. However, although this fact adds sympathy to Henninger's case, his argument fails. The Federal Tort Claims Act excepts certain types of actions from the general rule that the Government is immune from suit. *Feres v. United States, supra,* 340 U.S. at 139-40. Henninger's claim is not cognizable under the Act, and is therefore not one to which Congress has consented. It is axiomatic that no representations by Government agents can waive the Government's immunity.[4] *Cf. Federal Crop Insurance Corp. v. Merrill,* 1947, 332 U.S. 380.

Affirmed.

[4]Henninger also suggests that preventing him from maintaining this action would violate his Fifth Amendment right to due process, although he does not tell us why. We see no reason why Congress could not choose to restrict servicemen to their administrative remedy.

Office of the Clerk
United States Court of Appeals
For the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 26467 Richard V. Henninger vs. USA

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-17-73 Affirmed the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,
/s/ Dennis R. Matthews
Dennis R. Matthews,
Clerk of Court